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No. 93-44

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act") does not violate the First Amendment.

Section 5 requires cable operators to carry, with certain important limitations, the signals of noncommercial educational television stations. Section 4 of the 1992 Cable Act, which appellants also challenge, enacts must carry require-

ments with respect to commercial television stations. Although appellants have indiscriminately lumped Sections 4 and 5 together, the two provisions are in fact distinct and severable. Section 5 is supported not only by the same substantial governmental interests that support Section 4, but also by important governmental interests that apply only to public television stations. Furthermore, Section 5 will have a substantially more limited impact on cable operators than Section 4. Thus, while the public broadcasters endorse the constitutionality of Section 4, they also submit that there are independent reasons to affirm the decision below with respect to Section 5 even if the Court determines that it should hear further argument with respect to Section 4.

STATEMENT

Section 5 of the 1992 Cable Act was enacted against the backdrop of public television's special position in the telecommunications infrastructure, the unique characteristics of cable television, and the threat that cable presents to the continued viability of local public television.

A. The Special Position of Public Television.

Since 1952, when the FCC reserved nearly one-third of the nation's broadcast television channels for noncommercial educational licensees, a primary objective of our national telecommunications policy has been to assure that all Americans have access to locally-controlled public television services. *See* Television Table of Allotments, 47 C.F.R. § 73.606. Today, the noncommercial television infrastructure includes more than 347 stations spread across the country's approximately 211 television markets. These noncommercial licensees include a diverse array of local school boards and

other state and local agencies, colleges and universities, and a variety of other community-based nonprofit organizations.[1/]

Nowhere is the local orientation of public television more evident than in its commitment to educational programming. Nearly 70,000 schools with over 29 million elementary and secondary students use public television instructional programming. Public television stations have prepared thousands of adults, many of them disabled or of modest means, to earn the equivalent of a high-school diploma through telecourses. Since 1981, local stations, in conjunction with more than 1,800 colleges and universities, have brought telecourses to 1.4 million college students.

Public television stations also serve as vital local community institutions, serving as catalysts for action on issues of local importance such as literacy, racial harmony, AIDS, and the environment. *See* S. Rep. No. 102-221, 102d Cong., 2d Sess. 6-7 (1992), reprinted in 1992 U.S.C.C.A.N. 839-40. In addition, public television has become a leader in providing innovative video services to groups of viewers — such as the visually and hearing impaired, and non-English speakers — that are too small or too impoverished to attract other broadcast services. Indeed, just prior to passage of the 1992 Cable Act, Congress found in related legislation that public television is a "valuable local community resource . . . to address national concerns and solve local problems" and that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to

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1/ The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As recited in the 1992 Cable Act, the federal government has expended nearly $3 billion on public broadcasting since 1969. § 2(a)(8). State and local governments have contributed nearly $5 billion since 1972. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 69 (1992). Despite these substantial governmental expenditures, the development and operation of the system would not have been possible without private contributions (primarily from viewers), totalling over $6 billion during the same period. *Id.* *See* 1992 Cable Act § 2(a)(8).

public telecommunications services." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

B. Cable Television Is A Dynamic And Still-Evolving Technology.

Cable television operators perform three distinct functions. First, in its original and still primary role, cable serves as a "community antenna" service, passively transmitting the signals of broadcast television stations to viewers. Second, cable operators purchase and transmit programming produced by cable programmers. The average cable system presently has the capacity to carry about 36 channels, *see* S. Rep. No. 102-92, 102d Cong., 1st Sess. 3 (1991) ("1991 Senate Report"), although there are more than 75 cable programmers. *See* Jurisdictional Statement ("J.S.") at 4.[2/] Consequently, not all cable programmers can obtain carriage on most cable systems, even without any requirement that cable operators carry broadcast signals.[3/]

Third, and most recently, a few cable operators have begun to produce and transmit their own original programming. In this capacity, cable comes closest to resembling the print medium. However, there was no showing in the district court that the must carry requirements

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[2/] In the district court, appellant National Cable Television Association asserted that the average cable system has the capacity to carry 40 channels and that there are 80 national and 48 regional cable programming networks. *See* NCTA Statement of Material Facts ¶¶ 3, 5 (February 12, 1993) (Court Record ("CR") 147).

[3/] Some cable programmers are owned by, or are otherwise affiliated with, entities that own multiple cable systems. In these circumstances, as Congress found, a cable operator will often give preference to programming produced by cable programmers with which it is affiliated. *See, e.g.*, 1991 Senate Report at 24-26.

of the 1992 Cable Act threaten to displace any of the *de minimis* original programming produced by cable operators.

Today, cable television is a highly dynamic and still evolving technology. While the average system has a capacity of about 36 channels, some cable systems have as many as 150 useable channels. Technological developments have placed channel capacity of this magnitude within reach of nearly all cable systems, and further developments promise to provide virtually unlimited channel capacity (500 or more channels) within a few years. Thus, in the not too distant future, cable systems will have the capacity to carry all broadcast signals and all cable programming.[4/]

C. Cable's Role As A Gatekeeper And Prior Regulatory Responses.

Cable's role as a conduit gives it a unique status as the "gatekeeper" into cable homes. This is because, as Congress found, "[a]ll evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over the air." H.R. Rep. No. 102-628, 102d

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[4/] The dynamic state of cable system technology is set forth in detail in the Affirmations of Michael C. Rau, Senior Vice President, Science & Technology, of the National Association of Broadcasters. These Affirmations were submitted to the district court below and are included in the accompanying Public Broadcasters' Appendix to this Motion to Affirm ("Pub. Broad. App.") at 5a, 18a. As Mr. Rau makes clear, expanding channel capacity for cable systems is being driven by three revolutionary technologies: fiber optics, video compression, and video server technology. Fiber optics increases the physical channel capacity of the cable system. Video compression makes more efficient use of (and thereby expands) whatever physical channel capacity the cable system possesses. *See* 11/23/92 Rau Aff. ¶ 15 (Pub. Broad. App. at 11a). Video server technology may render even these advances obsolete, as it effectively moves the channel selector switch upstream in the cable system so that the television receiver only needs the capacity to carry the program being viewed. The sum total of these developments is that "*channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past.*" 2/12/93 Rau Aff. ¶ 18 (Pub. Broad. App. at 26a) (emphasis added).

Cong., 2d Sess. 54 (1992) ("1992 House Report"). With over 60% of all television households now receiving cable, 1991 Senate Report at 3, cable operators have enormous control over what programming viewers can see. This gatekeeper function, unless otherwise restrained, gives cable systems the ability to "cherry pick" broadcast stations, dropping or giving unfavorable channel placement to any station perceived to be in competition with the cable operator's preferred programming, or otherwise considered to be less desirable, less popular, or less profitable.

Cable's power as gatekeeper has been greatly enhanced by its freedom to use the programming of broadcast stations without their consent. When cable was a pure "conduit," doing nothing but retransmitting broadcast signals, the Supreme Court found this passive activity to be so devoid of expressive content that it did not constitute a "performance" for purposes of the copyright laws.[5/] When Congress finally did subject cable to copyright liability for carrying broadcast signals, it granted cable a "compulsory" license to carry all local signals without consent or cost. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111 (1988). The FCC has concluded that the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced contract" and contributed significantly to the cable industry's "explosive" growth. 1990 FCC Cable Report, 5 F.C.C.R. 4962, 5038 (1990).

In adopting the 1976 Copyright Act, Congress was aware that cable systems might abuse their power and deny local broadcast stations access to the viewers they were licensed to serve. But Congress relied on the fact that, in 1965, the FCC had adopted a careful array of regulations governing

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[5/] *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 402-05 (1974) (extending *Fortnightly* to cable systems that import distant broadcast signals).

cable's use of broadcast signals — foremost of which were the must carry rules — that were designed to protect the universal reach of the local broadcast system.[6/]

In 1984, Congress substantially deregulated the cable industry,[7/] but left the compulsory license in place. In so doing, Congress relied on the fact that the FCC's must carry rules would remain operative as a crucial counterweight to cable's freedom from copyright liability. "Given the current compulsory licensing system for cable systems under the copyright laws, if the 'must carry' rules were eliminated, local cable operators might not carry some local broadcast stations." S. Rep. No. 98-67, 98th Cong., 1st Sess. 11 (1983). Because of "the importance of local programming," Congress saw "a need to continue the existing 'must carry' rules to protect the public interest." *Id.* at 11-12.

This careful balance between the compulsory license and the FCC's must carry rules was upset in 1985 in *Quincy*,[8/] and again in 1987 in *Century*,[9/] when the D.C. Circuit found two different versions of the Commission's must carry rules invalid under the First Amendment. Although both decisions stressed that must carry requirements were not *per se* invalid under the First Amendment,[10/] both concluded that the

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[6/] *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5704-05; 1992 House Report at 48.

[7/] Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*

[8/] *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[9/] *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[10/] *See Century*, 835 F.2d at 304 ("We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance

(continued...)

Commission had failed to justify its rules on the factual record. The net effect of these decisions was to eliminate the must carry rules and throw the video industry into significant imbalance. As the FCC found in 1990, the elimination of must carry rules "drastically" and unfairly changed the relationship between the cable and broadcast industries and threatened the universal availability of public broadcast signals. *See* 1990 FCC Cable Report, 5 F.C.C.R. at 5038. The Commission therefore unequivocally recommended that Congress enact must carry requirements for public television. *Id.* at 5044.

D. The Congressional Response To *Quincy* And *Century*.

Following *Quincy* and *Century*, Congress undertook a comprehensive five-year investigation into the cable-broadcast relationship. The results of this inquiry were clear and unequivocal. *First*, Congress found that the cable industry has monopoly status in the market — *i.e.*, that it has become "highly concentrated" and "vertically integrated," "making it more difficult for noncable-affiliated programmers [such as public broadcasters] to secure carriage on cable systems." 1992 Cable Act § 2(a)(3), (4) & (5). "As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals," Congress found that "the economic viability of free local broadcast television . . . will be seriously jeopardized." § 2(a)(16).

Second, Congress found extensive evidence of discriminatory behavior by cable operators against public television stations, especially those that offer educational and instructional programming. *See* 1992 House Report at 70.

[10/](...continued)
substantial government interests."); *Quincy*, 768 F.2d at 1463 ("[W]e have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

For example, an FCC study submitted to Congress revealed that between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. *Cable System Broadcast Signal Carriage Survey, A Staff Report by the Policy and Rules Division, FCC Mass Media Bureau*, at 10 (Sept. 1, 1988) (cited, *e.g.*, in 1991 Senate Report at 42 n.102; 1992 House Report at 52 n.51). The FCC study also showed that 182 stations had been involuntarily repositioned on 541 occasions between 1985 and 1988. *Id.* at 19.

Third, Congress found that a must carry requirement for public television stations would impose only a minimal burden on the cable industry. *See* 1992 House Report at 71. Data supplied to the Congress showed that a blanket requirement for carriage of *all* substantially unduplicated public television programming would have the following effects:

- 84 percent of all cable systems would be required to carry one public station;
- 13 percent would be required to carry two public stations; and
- 3 percent would be required to carry more than two public stations.

Id.[11/]

[11/] The 1992 Cable Act has even less impact than this hypothetical "blanket" requirement because it limits the number of public television stations that must be carried (depending on cable channel capacity) and eliminates substantial duplication. Indeed, the impact is so minimal that the National Cable Television Association, an appellant here, agreed in 1990 to support must carry legislation limited to public television. *See Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 85 (March 1 and Apr. 19, 1990).

Fourth, Congress found that "there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations." 1992 Cable Act § 2(a)(7). Those substantial government interests include "provid[ing] public service programming that is responsive to the needs of the local community," "furthering the educational development of all citizens," and "protect[ing] the nation's substantial investment in and commitment to public television services." *Id.* § 2(a)(8)(A) and (B); 1992 House Report at 68. Congress further concluded that "absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television stations, will be deprived of those services." 1992 Cable Act § 2(a)(8)(D).

Fifth, Congress also gave careful and extended consideration to the constitutionality of the must carry provisions. *See, e.g.*, 1992 House Report at 58-74; 1991 Senate Report at 53-62. In Congress' view, the must carry requirements are nothing more than "economic regulations designed to promote competition and diversity of voices in communications services," 1991 Senate Report at 55, and, as such, should be upheld under the minimal standard of First Amendment review set forth in *Associated Press* v. *United States*, 326 U.S. 1 (1945). *Id.*; *see* 1992 House Report at 72. In addition, Congress cited Section 5's content-neutrality, its service of substantial government interests, and its minimal burden on the cable industry as grounds for upholding that provision under *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See* 1992 House Report at 62-67, 72-74; 1991 Senate Report at 57-62.

E. Section 5 of the 1992 Cable Act.

Section 5 of the 1992 Cable Act requires cable operators to carry the signals of qualified local noncommercial educational ("NCE") television stations that request carriage.

§ 5(e).[12] The number of NCE stations that must be carried under Section 5 depends on the channel capacity of the cable system. Systems with twelve or fewer useable activated channels are required to carry the signal of only one NCE station. § 5(b)(2)(A). Cable systems with thirteen to thirty-six channels are required to carry at least one NCE station, but not more than three. § 5(b)(3)(A). Cable systems with capacities of more than thirty-six channels are required to carry all NCE stations that request carriage. The requirements for systems with thirteen or more channels, however, are modified where there is substantial duplication in the programming of the eligible NCE stations. § 5(b)(1) & 5(e).[13]

The limited burden of Section 5's must carry obligations on cable operators is further reduced by the statute's interrelationship with the scheme for public, educational and government ("PEG") channels established in the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* Under that statute, a franchising authority may require a cable operator, as one of the terms of its franchise, to designate channels for public, educational, or governmental use. 47 U.S.C. § 531. When a cable operator is required under Section 5 of the Cable Act to add the signal of an NCE station, the cable operator may do so, subject to approval by the franchising authority, by placing that additional signal on a PEG channel that is not in use for its designated purpose. § 5(d). In these circumstances, the must carry obligation is

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[12] A qualified noncommercial educational television station is (1) a station licensed by the FCC as such, owned by a public agency or nonprofit entity, and eligible to receive a grant from the Corporation for Public Broadcasting; or (2) a station that is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. 1992 Cable Act § 5(l)(1).

[13] Substantial duplication has been defined by the FCC. *See* FCC Final Report and Order, 58 Fed. Reg. 17350, 17351 (1993) (to be codified at 47 C.F.R. Part 76).

fulfilled without any additional loss of current channel availability by the cable operator.[14/]

Section 5 also creates certain channel positioning rights. Each NCE station having a mandatory carriage right under Section 5 must be carried, at its election, on its current over-the-air channel, its channel position as of July 19, 1985, or on such other channel number that is mutually agreed upon by the station and the cable operator. § 5(g)(5).

F. The Decisions Below.

On April 8, 1993, the three-judge district court (by a 2-1 decision) held that Sections 4 and 5 of the Cable Act do not violate the First Amendment freedoms of speech and press. The court prefaced its opinion with a careful review of the "exhaustive" Congressional fact-finding process (discussed above) that resulted in the enactment of the Cable Act. J.S. App. 10a. In particular, the court took note of the "indisputable" evidence before Congress concerning the cable industry's dominance of the video signal distribution market, *id.* at 24a. and the corresponding evidence of the dangers facing local broadcasting, *id.* at 12a, 25a. As aptly summarized by the district court, "unrestrained, cable holds the future of local broadcasting at its mercy." *Id.* at 26a.

In light of this record, the district court held that the Act "is simply industry-specific antitrust and fair trade practice regulatory legislation" that is "justified by the existing

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14/ Neither the section of the 1984 Act authorizing the reservation of PEG channels nor the action of any franchising authority pursuant to that section is being challenged on this appeal. However, appellant Time Warner's omnibus complaint in this action did include such a challenge; that claim is currently pending before the single-judge district court. *See Turner* v. *FCC*, 810 F. Supp. 1308 (D.D.C. 1992) (severing Time Warner's challenge to the 1984 Act, as well as all challenges to provisions of the 1992 Act other than sections 4 and 5, from the three-judge district court's jurisdiction).

structure of the cable business itself" and designed to "create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anticompetitive practices." J.S. App. 13a. As such, "the must carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages" that the cable industry might convey. *Id.*

Accordingly, the district court applied the First Amendment balancing test for content-neutral regulation established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), as modified by *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). The must carry requirements meet this test, the court held, because they are supported by substantial government interests, including the promotion of fair competition among video "speakers" and the preservation of local broadcasting, J.S. App. 23a, and because they serve those substantial government interests effectively without unnecessarily burdening a significant amount of the cable industry's speech, *id.* at 27a. Indeed, on the latter point, the district court specifically noted the minimal burden imposed by Section 5. *Id.*

Judge Williams dissented. Although he agreed with Congress and the majority that cable industry "bottlenecks" in the free flow of video information pose "a very real problem," he asserted that the remedy chosen by Congress — must carry — is not the least restrictive alternative available for solving the problem. J.S. App. 50a, 66a. Judge Williams also disagreed with Congress' (and the majority's) factual finding that cable poses substantial dangers to the continued vitality of local broadcasting. *Id.* at 60a-67a. Thus, he concluded that the must carry provisions should be reviewed, and struck down, under strict First Amendment scrutiny. In so doing, however, Judge Williams plainly rejected plaintiffs' contention that Congress is constitutionally barred from imposing any type of access requirements on cable operators. *Id.* at 51a.

On April 14, 1993, the district court denied plaintiffs' request for an injunction pending appeal. On April 29, 1993, Chief Justice Rehnquist (as Circuit Justice for the District of Columbia Circuit) denied the same request. The Chief Justice found that "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a.[15/] He further noted that "even the dissenting judge [below] rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry." *Id.* at 2a. Indeed, all judges on the district court "recognize[d] that the government may regulate cable television as a medium of communication." *Id.*

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

This Court should affirm the three-judge district court's determination that Section 5 of the Cable Act does not violate the First Amendment. As an initial matter, this case is not appropriate for the Court's review because the cable industry is on the verge of a revolutionary increase in channel capacity. The First Amendment standard to be applied to each medium of communication depends on the special characteristics of that medium; accordingly, this Court should not undertake to fashion a standard for cable television at a time when its fundamental technological characteristics are in a state of such significant flux.

Even if the Court determines that it must reach the merits of this appeal, it should nonetheless affirm the district court's conclusion that Section 5 is constitutional. Appellants face a heavy burden in attempting to overturn a presumptively

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15/ Chief Justice Rehnquist's denial of appellants' request for an injunction pending appeal is reported at 113 S. Ct. 1806 (1993), and is reprinted in the accompanying Public Broadcasters' Appendix. Pub. Broad. App. at 1a.

constitutional Act of Congress. That burden is only increased by the facial posture of appellants' claims and the deference owed by this Court to the extensively detailed findings of fact made by Congress in support of Section 5. Appellants cannot overcome this extraordinary burden here.

In order to affirm the constitutionality of Section 5, the Court need only apply the intermediate First Amendment balancing test established in *O'Brien* for content-neutral regulation. This standard is appropriate because of Section 5's content-neutrality, its incidental impact on speech, and the many factors distinguishing the cable industry from traditional print media — including the longstanding regulatory relationship between government and cable, and the bottleneck characteristics of cable operators. Further, Section 5 meets the *O'Brien* standard because it serves several substantial government interests and is no broader than reasonably necessary in doing so.[16/]

I. CABLE TELEVISION TECHNOLOGY IS ON THE VERGE OF DRAMATIC CHANGE, RENDERING THIS CASE INAPPROPRIATE FOR THE COURT'S REVIEW.

The issues presented by appellants are not appropriate for the Court's review at this time. As noted in the Statement, cable technology is in a state of significant flux. Accordingly, it would be premature for the Court to grapple

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16/ As content-neutral economic regulation, Section 5 is appropriately analyzed for First Amendment purposes under the rational basis review standard established in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and related cases. However, as the public broadcasters make clear below, the Court need not apply the lower level of First Amendment review set forth in *Associated Press* in order to grant this motion to affirm. However, if the Court notes probable jurisdiction, the public broadcasters reserve the opportunity to argue, as they did below, that rational basis scrutiny is appropriate in this case.

with the question of what First Amendment standard should apply to this technology.

Although cable operators are entitled to First Amendment protection, *see Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442 (1991), that conclusion does not answer the question of precisely what First Amendment standard should be applied to their claims. *See City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). As the Court has pointed out, the characteristics of a particular medium may justify "differences in the First Amendment standards applied to [that medium]." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969).

In *Preferred Communications*, the Court declined to address cable operators' First Amendment claims because the Court did not know enough about the nature of the cable industry. *See* 476 U.S. at 495. As Justice Blackmun wrote in his concurrence, "[i]n assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." 476 U.S. at 496. Most recently, in denying appellants' application for an injunction pending appeal, Chief Justice Rehnquist observed that "we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters." Aff. App. at 3a.

Thus, this case, if accepted for plenary review, may require the Court to decide whether the characteristics of cable television, as presented on the record of this case, warrant application of the First Amendment standard traditionally applied to newspapers, *see Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), that applied to wireless broadcasters, *see Red Lion*, 395 U.S. 367, or some new and unique standard. This would be a challenging task under any

circumstances, but it is a task the Court ought not to take up at a time when the fundamental characteristics of cable television are still evolving. In short, appellants ask the Court to fashion a First Amendment standard for a moving target.

For example, technological developments promise to moot entirely the claims of the cable programmers. As discussed above, although the number of cable programmers presently exceeds the capacity of the average cable system, this balance will shortly be reversed. Some cable systems already have as many as 150 channels — a capacity that exceeds the number of programmers — and within two or three years many more systems will reach this same level of capacity. Indeed, capacity of as many as 500 channels is on the immediate horizon. *See supra* at 5; 2/12/93 Rau Aff. ¶¶ 9, 11 (Pub. Broad. App. at 22a-23a). When channel capacity exceeds the number of programmers vying for carriage, programmers cannot attribute their failure to achieve carriage to must carry requirements.[17/]

Cable operators no doubt will continue to argue that their First Amendment rights are violated so long as they are required to carry any broadcast signal they would not otherwise choose to carry. Assuming *arguendo* that the must carry requirements cause any such injury (a proposition with which we disagree), the need for this Court's attention, from a practical perspective, is much reduced if cable systems with

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17/ Appellants may respond that the number of cable program networks and other uses of cable channels will expand at the same rate as channel capacity, but that is no response to the point made in text. To begin with, the record does not demonstrate that cable systems with capacities of 150 channels currently carry all available programming. Instead, such systems continue to make commercial judgments about the appeal of various programming. *See* Affidavit of Joseph J. Collins at ¶ 17 (Feb. 12, 1993) (CR 152). Moreover, the question of whether the supply of programming will keep up with expanded channel capacity is precisely the sort of speculative factor that makes the fashioning of a First Amendment standard for cable television inappropriate at this time.

150 or 500, rather than the current average of 36, channels are required by statute to carry a handful of broadcast signals. Thus, assuming that cable operators have suffered any First Amendment injury, technological developments have already reduced that injury to a *de minimis* level for some cable systems and promise to do so for other systems within the near future.

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON THE MERITS.

A. Appellants Face An Insurmountable Burden.

Appellants face an insurmountable burden in attempting to strike down the 1992 Cable Act. First, as Chief Justice Rehnquist confirmed in denying appellants' request for an injunction pending appeal, "[t]he 1992 Cable Act, like all Acts of Congress, is presumptively constitutional." Pub. Broad. App. at 1a. This presumption is a factor that should be taken into account in evaluating appellants' claim on the merits, especially where, as here, Congress gave extensive and deliberate consideration to the question of the Cable Act's constitutionality. *See Brown* v. *Kendrick*, 487 U.S. 589, 617 (1988); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *supra* page 10. In short, the judgment of the 102d Congress "cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

Second, appellants must overcome the even greater deference owed by this Court to the extensive and detailed Congressional findings of fact underlying the Cable Act. Such deference is compelled by the fact that "Congress is an institution better equipped [than a court] to assess and evaluate the vast amounts of data bearing on [the] issue[s]." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305,

331 n.12 (1985); *accord Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 563 (1990); *Rostker*, 453 U.S. at 72-73. Accordingly, there is no basis for appellants' contention that the Court should re-weigh the massive factual record analyzed by Congress.

Finally, the facial posture of appellants' constitutional challenge imposes an additional burden on their claim. As this Court has stated, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767 (1991) (internal quotation omitted).[18] Indeed, all that a defendant need do to defeat a facial challenge is to demonstrate some set of circumstances under which the statute could be constitutionally applied. *Id.*

There is at least one circumstance in which Section 5 can be applied without causing any of the constitutional harm alleged in this case. As noted above, cable systems can comply with Section 5 by placing noncommercial stations on unused PEG channels. Thus, it is entirely conceivable that for some cable operators compliance with Section 5 will not involve any loss of channels otherwise available to them.[19] Because there is a set of circumstances under which Section 5 can be constitutionally applied, appellants' facial challenge to that section is doomed.

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[18] *See also Younger* v. *Harris*, 401 U.S. 37, 52 (1971) (courts passing on the constitutionality of statutes on their face are acting "fundamentally at odds with the function of the federal courts in our constitutional plan").

[19] All that is required for such a scenario is a willing franchising authority and a cable operator with unused PEG channels that equal or exceed the number of qualified local noncommercial educational television stations required to be carried (*i.e.*, only one station for more than 80 percent of the cable systems).

B. Section 5 Should Be Reviewed Under A First Amendment Standard No More Stringent Than That Set Forth In *O'Brien-Ward*.

The district court's denial of appellants' constitutional challenge to Section 5 can be affirmed by applying an intermediate level of First Amendment scrutiny, as established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). As demonstrated below, several factors justify the choice of this standard, including Section 5's content neutrality, its incidental impact on speech, and the special characteristics of the cable industry.

1. Section 5 Is Content-Neutral.

It is well-settled that the core of First Amendment protection is a bar against regulation directed to suppressing the content of free expression. *See, e.g., Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). This Court has counseled that, in determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward*, 491 U.S. at 791. Thus, "[g]overnment regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." *Id.*; *accord Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986).

Applying this standard here, it is clear that Section 5's must carry provisions are content-neutral. As set forth in substantial detail in the Act itself, these provisions are based on Congress' concern over the monopolistic position of cable systems, the corresponding likelihood that citizens will be deprived of local public television programming, and the consequent demise of local public television stations, which Congress found to be vital community institutions in which the nation has made an enormous investment. 1992 Cable

Act, § 2(a)(2), (3), (4), (5), (6), & (8). *See supra* pp. 8-10.[20/] In short, Congress' purpose in enacting Section 5 was to preserve and promote continued access to the institution of public television — not to any particular programming — in the face of economic conditions that are denying viewers that access now and may increasingly do so in the future. *See, e.g.*, 1992 Cable Act § 2(a)(8); 1992 House Report at 68.

Despite appellants' protestations, *see* J.S. at 20-21, Section 5 cannot be considered content-based because it fosters — through public television — the substantial government interests in education, localism, diversity, and community service. These interests are institutional ones, similar to those served by universities or libraries, and are not, therefore, associated with any particular speech or point of view.[21/] Instead, Section 5 is nothing more than content-neutral economic regulation — akin to the antitrust laws or commercial regulations — designed to eradicate market imbalances and ensure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

2. Section 5 Has Only An Incidental Impact On Speech.

Because Section 5 of the Cable Act is content-neutral, and does not compel or prohibit the expression of any

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[20/] The legislative history of the Act contains a similar analysis. *See, e.g.*, 1992 House Report at 68-72.

[21/] No one could argue that government support for a library or university constitutes government preferment for the books the library chooses for its shelves or the university chooses for its courses. Similarly, because Section 5 does not dictate the content of public television programming that must be carried by cable operators, the governmental support for the institution of public television does not offend the First Amendment.

particular viewpoint or message, its impact on speech is entirely incidental. As the district court correctly found, the indirect impact of Section 5 is another factor weighing in favor of a low level of First Amendment review. *See* J.S. App. 15a-19a; *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 47-48 (D.C. Cir. 1977).

Appellants contest this conclusion on the ground that the must carry provisions impermissibly infringe on cable operators' "right not to speak" — previously described in this litigation as the cable operators' "editorial discretion." J.S. at 16-18. For this, appellants rely on *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974), in which the Court struck down a Florida statute granting political candidates the right to reply to criticisms published in newspaper editorials. Unlike the statute in *Tornillo*, however, which authorized a right of access predicated on content (*i.e.*, a "response" to the newspaper's view), the must carry rules do not dictate that cable systems carry broadcast "speech" having any particular content. *Cf.* 1992 House Report at 69, 72 (discussing enormous variety of public television content). Nor are cable operators "being compelled to affirm their belief in any governmentally prescribed position or view." *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).[22/] Given the minimal burden on cable systems imposed by Section 5, *see supra* p. 9, this provision will not impose any

[22/] For these same reasons, appellants' reliance on *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781 (1988), is misplaced. In *Riley*, the Court struck down a state law that required entities engaging in particular speech (charitable solicitation) to engage in other particular speech (the disclosure of certain information). Here, Section 5 is not based on the content of the cable operators' speech, nor does it require carriage of programming with any particular content.

limitation — substantial or otherwise — on a cable operator's "right not to speak" or alleged "editorial discretion."[23/]

Second, plaintiff argues that the must carry provisions discriminate against the cable industry in order to promote the speech of broadcasters. J.S. at 19-20. This argument, however, has been rejected by the Court on several occasions. For example, in *FCC* v. *National Citizens Coalition For Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), the Court upheld the FCC's rules restricting cross-ownership of same-market media outlets as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. The Court held that "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be." *Id.* at 800 (internal citations omitted).

More recently, in *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1446 (1991), the Court explicitly stated that "a differential burden on speakers is insufficient by itself to raise First Amendment concerns." Indeed, if it were true that strict scrutiny applied to any regulation favoring one member of the media over another, then there would be no basis for the government's well-settled right to arbitrate between the claims of competing speakers under valid time, place, and manner restrictions. *See, e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (favoring the "natural speech" of residents and

[23/] In addition, the nature of the "editorial discretion" exercised by cable operators is far removed from that exercised by newspaper editors. Except for the few cable operators who produce their own programming, cable systems are passive conduits for the speech of others. While there may be some discretion involved in choosing which programming to transmit, it is plainly not the same discretion exercised by newspaper editors.

denizens of public fora over the "amplified" speech of persons driving sound trucks).[24/]

3. The Cable Industry Is Unlike The Print Medium.

A final factor justifying a low level of First Amendment scrutiny is that the cable industry possesses a number of unique characteristics that distinguish it from the traditionally-protected print medium. First, unlike the print medium, the cable industry has for almost thirty years been the recipient of substantial government assistance. For example, unlike *any* business entity other than traditional public utilities, cable relies for dissemination of its message upon the permanent physical occupation of governmental resources. In order to provide cable service to subscribers, cable wires and associated equipment must be hung from utility poles, housed in underground utility ducts, or otherwise placed in or across public rights-of-way. Further, cable operators necessarily depend upon franchising authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Cable operators also receive a host of statutory benefits. For example, government regulates the rates for cable's access to utility poles. *See* 47 U.S.C. § 224. Congress also imposes a limit on the amount of the fees local franchising authorities can extract from cable operators. *See* 47 U.S.C. § 542. Indeed, even the existence of the franchising authority is a benefit to the cable industry, because, as a practical

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[24/] Appellants' argument is based on a vastly overstated reading of *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976). But even the *Buckley* Court recognized that this "favoritism" principle applies only in "traditional free speech case[s]" and not in cases, such as those involving the broadcast media or, indeed, the cable industry, posing "unique and special problems." 424 U.S. at 50 n.55. *See also* J.S. App. 17a-18a (finding that *Buckley* does not support appellants' favoritism argument).

matter, the number of such franchises is necessarily limited. *See* 47 U.S.C. § 541.

In addition, under the provisions of the Copyright Act, cable operators are granted a compulsory license to retransmit broadcast signals. *See* 17 U.S.C. § 111(c) & (d) (1992). Thus, government (and the broadcasting industry) essentially subsidizes cable operators by granting them free and unrestricted access to local broadcasting. While Section 6 of the Cable Act alters this regime to some extent for commercial broadcasters, the retransmission consent scheme established by Section 6 does not apply to public broadcasters. *See* 47 U.S.C. § 325(b)(2)(A).

The existence of these numerous government benefits is a characteristic unique to the cable industry and stands in stark contrast to the historic independence (and even antagonism) of the print medium vis à vis the government. Moreover, as numerous courts have found, the existence of these benefits justifies a less searching First Amendment standard than that traditionally applied to the print media.[25/]

[25/] *See, e.g., Warner Cable Communications* v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991); *Chicago Cable Communications* v. *Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (Posner, J.); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc.* v. *City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Erie Telecommunications, Inc.* v. *City of Erie*, 659 F. Supp. 580, 599-600 (W.D. Pa. 1987), *aff'd*, 853 F.2d 1084 (3d Cir. 1988); *Carlson* v. *Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Berkshire Cablevision* v. *Burke*, 571 F. Supp. 976, 985-88 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). *But see Preferred Communications, Inc.* v. *City of Los Angeles*, 68 Rad Reg.2d (P&F) 121 (C.D. Cal. 1990); *Century Federal, Inc.* v. *City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987); *Group W Cable, Inc.* v. *City of Santo Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987).

Second, the cable industry is also distinguishable from print because of its increasingly dominant position as a distributor of information to household televisions. Cable's role as an information bottleneck results from the physical scarcity of public rights-of-way — scarcity that, as a practical matter, completely insulates most cable operators from competition. Indeed, Congress cited the "necessarily severely limited number of franchised cable systems able to operate in any one community," as grounds for ensuring, through must carry, that "the diversification principle is not undermined in this increasingly important governmentally franchised medium." 1991 Senate Report at 51-52.

Congress' findings have been echoed by numerous courts in their review of cable regulations. *See supra* note 25. Because cable operators are increasingly acting as impediments, rather than facilitators, to the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press*, 326 U.S. at 20, regulations governing their activity need not be accorded the highest standard of First Amendment review.[26/]

C. Section 5 Should Be Upheld Under *O'Brien-Ward*.

Under *O'Brien-Ward*, the must carry rules clearly satisfy the First Amendment because they serve "substantial"

[26/] As the district court made clear, the *Tornillo* Court's rejection of a similar economic scarcity argument is distinguishable here because of the content-based nature of the right-of-reply law at issue in that case. J.S. App. 22a n.25. *Tornillo* is also distinguishable because newspapers do not function in the same "bottleneck" capacity as do cable operators. Even in one-newspaper communities, there are a myriad of ways for print speakers to reach their audiences — flyers, leaflets, newsletters, alternative newspapers, and the like. In contrast, the sole cable operator in a community typically determines which voices will be heard by cable subscribers in that community. This peculiar characteristic of cable compels a lower level of First Amendment scrutiny than that applied to print.

government interests and are no broader than necessary in doing so.[27/]

As set forth in the Act and its legislative history, the Cable Act's must carry provisions are intended to further several longstanding government interests: (1) preserving for the public the benefits of local television service, (2) promoting the widespread dissemination of information from diverse sources, and (3) promoting fair competition in the video marketplace. *See generally* 1992 Cable Act § 2(a). With respect to Section 5 in particular, the must carry rules also serve the goals "of furthering the educational development of all citizens and . . . protect[ing] the nation's substantial investment in and commitment to public television services." 1992 House Report at 68; *see id.* at 68-74; 1992 Cable Act § 2(a)(8).

As the district court found, the substantiality of each of these interests is "beyond dispute." J.S. App. 23a. Localism, diversity, and fair competition have served as the touchstones of Congressional regulation of the television industry — and judicial review of that regulation under the First Amendment — since 1934.[28/] More recently, in its amendments to the 1934 Communications Act, Congress made the point as clearly as it can be made: "public television

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[27/] As made clear above, Section 5 meets *O'Brien*'s requirement that "the governmental interest [underlying the regulation] is unrelated to the suppression of free expression." 391 U.S. at 377. As demonstrated by the entirety of this Motion to Affirm, Section 5 also meets *O'Brien's* requirement that the government regulation at issue be "within the constitutional power of the Government." *Id.*

[28/] *See, e.g., Metro Broadcasting, Inc.*, 497 U.S. at 567 ("the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984) ("There can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn.38-39 (1968).

and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs." Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)). Thus, "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunication services through all appropriate available telecommunications distribution technologies." *Id.* Indeed, appellants do not even appear to contest the point in their Jurisdictional Statement.[29/]

The Cable Act's must carry rules are also no broader than reasonably necessary to achieve the government's interest, thus satisfying the second major prong of the *O'Brien* test. Congress has carefully crafted the requirements of Section 5 of the Cable Act to achieve its objectives with minimal burden on cable operators. Among other provisions, the must carry requirements of Section 5 are circumscribed in the following ways:

- The number of public television stations that a cable operator must carry is limited, depending on the number of channels available on the system. § 5(b)(1), (2) & (3).[30/]

[29/] Appellants do attack as "speculative" and "fanciful" Congress' finding that cable poses a threat to local broadcasting. J.S. at 25. That contention is both misplaced and wrong. Even if it was proper for this Court to re-weigh the factual evidence presented to Congress (which it plainly is not), that evidence clearly establishes the anticompetitive treatment accorded to local public television stations by cable operators following the demise of the FCC's must-carry rules. *See supra* pp. 8-9.

[30/] In general, systems with 12 or fewer channels are required to carry only one public television station; systems with 13-36 channels must carry one but no more than three public television stations; and systems with more than 36 channels must carry all public television stations that request carriage.

- The cable operator is not obligated to carry duplicate qualified signals. § 5(b)(3)(C).

- If the cable operator is obliged to add a public television station under the must carry rules, it can choose to carry that station on a PEG channel not then being used for its designated purpose, subject to the agreement of the franchising authority. § 5(d). *See* 1992 House Report at 100.

Section 5 is also congruent with Congress' interest in preserving and promoting localism. As Congress found, noncommercial stations have long been the beacon of localism in the television industry. Not only have they served the needs of local communities since noncommercial spectrum channels were allocated in 1952, but local governments and citizens have supported the continued provision of these services through substantial tax dollars and voluntary contributions. *See* 1992 Cable Act § 2(a)(8). In light of the economic structure and incentives of the cable industry, it cannot seriously be argued that Congress has overreached in preserving this locally supported educational service through modest must carry rules.

Finally, the channel position aspects of Section 5 serve the goal of promoting competition in the video services market. At the outset, it is difficult to conceive how positioning requirements burden any First Amendment interest, because they do not suppress any speech. Assuming that such a First Amendment interest exists, however, the channel positioning provisions are clearly justified. As found by Congress, if left unregulated, cable operators will have every incentive to shunt public television stations to even less desirable channels than they currently occupy. 1992 House Report at 71. Under these circumstances, the channel position requirements are clearly no broader than necessary to support the government's interest in meaningful access to public television services.

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

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Dated: September 7, 1993

APPENDICES

SUPREME COURT OF THE UNITED STATES

No. A-798

TURNER BROADCASTING SYSTEM, INC., ET AL.
v.
FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON APPLICATION FOR AN INJUNCTION

[April 29, 1993]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants have asked me, as Circuit Justice for the District of Columbia Circuit, to enjoin enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1471-1481, which require cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcast stations. Applicants, cable operators and programmers, contend that these "must-carry" provisions violate the First Amendment because (1) they tell cable operators what speakers they must carry, thereby controlling the content of the operator's speech and shrinking the number of channels available for programming they might prefer to carry; (2) they inhibit the operators' editorial discretion to determine what programming messages to provide to subscribers; and (3) they give local broadcast "speakers" a preferred status. I herewith deny the application.

The 1992 Cable Act, like all Acts of Congress, is presumptively constitutional. As such, it "should remain in effect pending a final decision on the merits by this Court." *Marshall* v. *Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977)

(REHNQUIST, J., in chambers). Moreover, the Act was upheld by the three-judge District Court, and even the dissenting judge rejected the argument now urged by applicants — that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry. __ F. Supp. __, __ (DC 1993). Unlike applicants, therefore, all three judges below would recognize that the government may regulate cable television as a medium of communication. *Ibid.*

Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends "judicial alteration of the status quo," an injunction "grants judicial intervention that has been withheld by the lower courts." *Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers). By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. See, *e.g.*, *Ohio Citizens For Responsible Energy, supra*, at 1313; this Court's Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2, 13 L. Ed. 12 (1964) (BLACK, J., in chambers).

An injunction is appropriate only if (1) it is "necessary or appropriate in aid or [our] jurisdiction," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear." *Communist Party of Indiana* v. *Whitcomb*, 409 U.S. 1235 (1972) (REHNQUIST, J., in chambers); *Ohio Citizens For Responsible Energy, supra*, at 1313. [illegible]t doubt, implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it "indisputably clear" that applicants have a First Amendment right to be free of the must-carry provisions. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), we struck down Florida's right of reply statute, holding that the State may not compel "editors or publishers to publish that which reason tells them should not be published." *Id.*, at 256 (internal quotation marks omitted). Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), however, we upheld the Federal Communications Commission's requirement that broadcasters cover public issues, and give each side of the issue fair coverage. Noting that there is a finite number of frequencies available, we stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.*, at 390. Although we have recognized that cable operators engage in speech protected by the First Amendment, *Leathers v. Medlock*, 499 U.S. ___, ___ (1991); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986), we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters. *Id.*, at 494-495.

In light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from government regulation. The application for an injunction pending appeal to this Court is therefore denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Turner Broadcasting System, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2247 (SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Daniels Cablevision, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2292 (SFW, TPJ, SS)
United States,	)	
Defendant.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition to Plaintiffs' Motion for Preliminary Injunction and the Opposition to Plaintiff's Motion for Summary Judgment filed by the National Association of Broadcasters in these cases.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity on cable systems. Briefly, technology improvements and increased customer expectations have resulted in a strong and unmistakable trend toward expanding channel capacity on cable television systems, especially at franchise renewal time, developments which make displacement either unlikely or unnecessary. Even without exploiting new technologies such as fiber optics and signal compression, today's cable and electronics technology easily allows substantial improvements in channel capacity. Often even the most primitive systems, with only 12-22 channels, can be upgraded to provide 40 channels without overhauling the system. Most new builds and rebuilds are for high capacity systems which can provide at least 80 channels. Some systems are now appearing with capacity of 150 channels or more.

4. There are two new technologies which are being used to dramatically expand the channel capacity of cable television systems: fiber optics and video compression. Installation of fiber optic networks is already proceeding for many cable operators. The capacity on optical fibers is only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to

80 NTSC television signals. NTSC is the current technical standard for U.S. television signals.

5. Video compression provides the greatest promise for long term expansion of cable channel capacity. Cable Laboratories (CableLabs), a technical facility funded completely by the cable industry, is evaluating standards proposals to develop a system for delivering compressed television signals from the cable head-end to consumers. Compression technologies already exist which can fit 4 NTSC quality video signals in an existing 6 MHz television channel. CableLabs expects to have a system available for cable operators' use by 1994.

6. Therefore, industry trends are combining with new technologies to expand the capacity of cable television systems. Systems such as one in Queens, New York, with 150 channels, are pointing the way to the future. If technology developments continue as most experts expect, compression will allow channel capacity on a cable television system to be multiplied by a factor of four, with compression equipment availability expected by 1994. Cable operators, foreseeing the imminent arrival of excess capacity, are exploring how to use these channels to branch out into personal communications and other businesses. A more detailed description of these developments follows.

Background

7. Channel capacity for a cable television (CATV) system is limited by the band-width available in the system. Every television channel carried on a cable system requires 6 MHz of bandwidth. Total system bandwidth, in turn, is limited by the physical properties of the cable system equipment.

8. A cable system can be divided into 5 parts: (1) the headend, (2) the trunk, (3) the distribution system, (4) the

drop cable, and (5) the customer premises equipment.[1/] The trunk is the long backbone cable that runs through the system to within a mile or so of each subscriber. The distribution system distributes the signal from the trunk throughout the various neighborhoods served by the system. The drop cable is the line which connects an individual subscriber to the cable distribution system.

9. The bandwidth of a system is limited by the trunk and, to a lesser extent, the distribution system and the drop cable. Only 14% of all cable footage is in the trunk.[2/] Thus, when cable systems are upgraded to expand their channel capacity, most of the existing cable is left intact.[3/] This has made it easy and commonplace for cable systems to increase their capacity as technology has improved.

Current CATV Capacity

10. Because the cable and electronic components used in CATV systems are fairly standardized, these systems tend to operate at a few bandwidth plateaus. On the lowest plateau are very old, small systems which operate at an upper frequency at 220 MHz, yielding up to 22 channels of capacity.[4/] On the upper plateau are modern, urban systems

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1/ Ciciora, *An Overview of Cable Television*, National Association of Broadcasters Engineering Handbook 731, 732 (8th ed. 1992).

2/ *Id.* at 746.

3/ *Id.*

4/ In figuring the channel capacity of a cable system, not all frequencies are used for distribution of video programs. The lower 54 MHz, as well as 20 MHz for the FM radio band, are not occupied with television signals. Another two 6 MHz channels, designated A1 and A2, are typically used for isolating system faults. Thus a system with a 220 MHz upper bandwidth limit has capacity for: (220-54-20-12)/6 = 134/6 = 22 channels.

operating at 1 GHz with over 150 channels of capacity.[5/] In between are plateaus at 330 MHz, 450 MHz, 550 MHz, and 750 MHz with capacities of up to 40, 60, 80 and 110 channels respectively.[6/]

11. No more than ten percent of cable plant today operates at the lowest capacity plateau of 22 or fewer channels.[7/] Even these systems can be, and often are, upgraded to 330 MHz and 40 channels without a complete rebuild. Seventy-five percent of cable plant today consists of systems with 330 MHz bandwidth and up to 40 channels of capacity. However, few new systems are built with the limited capacity of a 330 MHz system.[8/] Most new systems are built with bandwidths of 550 MHz providing 80 channel capacity.[9/] Already, 15% of existing cable plant is in the "high capacity" category.[10/]

5/ *See, e.g.*, Jesuale, *Video on Demand: Cable's Next Step?*, TV Technology, Sept. 1992, at 1, 48. The Time-Warner system in Queens, New York provides 150 channels of programming, went on-line in February 1992 and uses fiber optics in its trunk.

6/ *See* Ciciora, *supra* note 1, at 736.

7/ *Id.* at 736, 738.

8/ *See id.*

9/ *See* Moloney, Schilling, and Marz, *Expanded Bandwidth Requirements in CATV Applications*, 1992 NCTA Technical Papers 200, 201 [hereinafter *Expanded Bandwidth*] (noting the rapid expansion of cable system bandwidth "to the current standard level of 550 MHz").

10/ Ciciora, *supra* note 1, at 738.

Trends

12. Bandwidth expansion in CATV has been routine since the early days of cable.[11/] Clearly the trend is for new systems and rebuilds to expand bandwidth to 550 MHz or more with a capacity of at least 80 channels.[12/] This trend is being driven by consumer demands,[13/] and technology improvements.[14/]

13. This high-capacity trend is reported in a recent poll by Midwest CATV and *Cablevision*.[15/] The pool of 200 general managers revealed that 43% of the managers would upgrade or rebuild their system in 1993.[16/] An earlier poll showed that 36% planned to modernize in 1992.[17/] Of the

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[11/] *Expanded Bandwidth*, *supra* note 9, at 201. The authors note that bandwidth, and hence capacity, has doubled every 12-15 years.

[12/] *See, e.g.*, *Expanded Bandwidth*, *supra* note 9, at 200; Brugliera, *Compression and its Impact on Cable*, Communications Technology, May 1992, at 18; Vaughan, *Upgrades with Fiber: Selecting Cost-Effective Architectures*, 1991 NCTA Technical Papers 273.

[13/] *See, e.g.*, Brugliera, *supra* note 12, at 18 (noting the growth in available programming choices); Ciciora, *Scenarios for Compressed Video in Cable Practice*, 1991 NCTA Technical Papers 123. Ciciora maintains that "[w]hen given a choice, the American consumer has always chosen 'more' over 'better'." He points out that most VCRs are used in the six hour "EP" format despite "the noticeably superior video and dramatically better audio" available in the two hour "SP" mode. *Id.*

[14/] *See* Chiddix and Vaughan, *Upgrading Coaxial Distribution Networks with Amplified Taps*, 1991 NCTA Technical Papers 245 (discussing how low cost fiber technology is allowing 1 GHz systems to be built); Brugliera, *supra* note 12, at 18 (noting that steady advances in technology are extending cable plant bandwidth beyond 350 MHz and 450 MHz bandwidths).

[15/] *Building Blocks*, Cablevision, September 21, 1992, at 44.

[16/] *Id.*

[17/] *Id.*

managers planning upgrades or rebuilds, 78% said that they would be expanding the capacity of their systems. And 15% of those surveyed will be expanding their systems to a 1 GHz bandwidth and its capacity for 150 channels.[18/]

14. Thus, steady bandwidth and channel capacity expansion has been, and continues to be, the trend for all cable systems. Customer demands and technology improvements have fueled this expansion. However, two new technologies, *fiber optics* and *video compression*, promise to turn this slow, steady expansion into an imminent explosion in available capacity.

New Technologies for Expanding Channel Capacity

15. Fiber optics and video compression are two revolutionary new technologies which are being used to expand the channel capacity of cable television systems. Fiber optics expands the effective bandwidth of the cable system. Video compression makes more efficient use of whatever bandwidth is already available in the system. If a CATV system is analogized to a water distribution system, then adding fiber optics is like using a bigger pipe, and adding signal compression is like using a more powerful pump.

16. The combined impact of these technologies is an imminent explosion in channel capacity on CATV systems. Indeed, the impact of fiber optics alone on cable television has been compared to the tremendous growth of cable

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[18/] *Id.*

television popularity following its marriage to satellite technology in the 1970's.[19/] "Technology is making channel capacity ubiquitous and low cost."[20/]

Fiber Optics

17. Installation of fiber optic networks in CATV systems is now commonplace.[21/] Fiber optics is an extremely cost-effective approach to upgrading a cable trunk.[22/] The capacity of an optical fiber is, in practice, only limited by the electronics necessary to interface with the fiber. With today's electronics technology, a single fiber can carry up to 80 NTSC television signals.[23/] Many systems are built with several fibers bundled together for even greater capacity.

[19/] Mattson, *Fiber to Feeder Design Study*, 1991 NCTA Technical Papers 309, 319.

[20/] Pollack, *Packing Cable with Programs*, New York Times, January 22, 1992, at D1 (quoting Mr. Craig Tanner, Vice President for Advanced Television Products at Cable Television Laboratories (CableLabs)).

[21/] *See, e.g.*, Holobrow, Bohn, and Das, *Passive Optical Network (PON) Architectures and Applications*, 1992 NCTA Technical Papers 364 (noting that "fiber systems have supplanted coaxial trunking in most new and rebuild construction in the last two years."); Ciciora, *supra* note 1, at 738, 740, 746 (noting that optical fiber is now "frequently used" in cable systems as part of upgrades, rebuilds, and new builds).

[22/] *See*, Ciciora, *supra* note 1, at 746 (noting that some studies have shown that the cost of upgrading a system's trunk to fiber is less than $25 per subscriber). *See also* McGrath, *The Evolution of Broadband Hybrid Networks*, 1992 NCTA Technical Papers 124, 126 (proclaiming that, "[f]iber trunking/coax distribution . . . with analog bandwidths of 600 MHz (to a demonstrated top of 1 GHz) is now the architecture of choice.").

[23/] *See, e.g.*, Weinschenk, *Jerrold to Extend Starfire Family*, Cable World, April 20, 1992, at 62; Kearns, *An 80-Channel High Performance Video Transport System Over Fiber Using FM-SCM Techniques for Super-Trunk Applications*, 1991 NCTA Technical Papers 71.

18. In fact, fiber use has been proposed to interconnect cable systems with one another.[24/] In this vein, Adelphia Communications is currently building a 165 mile, 1 GHz fiber optic loop around the state of Vermont.[25/] And New Jersey Bell recently announced a partnership with Sammons Communications to build a fiber-to-the-curb (FTTC) system to 11,700 customers in New Jersey.[26/]

19. Once installed, fiber eliminates the capacity bottleneck on the cable trunk. In fact, many cable industry executives see the tremendous capacity made available by fiber as a tool to allow them to expand into the telephone and personal communications industries.[27/] Tele-Communications, Inc. has been testing personal communications networks (PCNs) with McCaw Cellular in Oregon.[28/] Meanwhile, CableLabs has formed a PCN Technical Advisory Subcommittee to explore provision of these services using the excess capacity on cable networks.[29/]

20. In addition to PCN, cable executives appear to want to use their new-found excess capacity to provide more pay-

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[24/] Stratton, *A Future Without Satellites*, Cable Television Business, July 1, 1990, at 20A.

[25/] *See Ring Around the State*, Cablevision, September 21, 1992, at 40.

[26/] Communications Daily, November 17, 1992, at 6.

[27/] Hart, *Cost Effective Cable Television Transport for PCN*, 1992 NCTA Technical Papers 148; Gitten, Albagli, and Walker, *Planning CATV-Based Personal Communications Networks*, 1992 NCTA Technical Papers 129.

[28/] *Impact of Fiber Optics*, Communications Technology, May 1992, at 28, 40.

[29/] Dukes, *CableLabs 1991 Advanced Network Development Work*, 1991 NCTA Technical Papers 232, 234.

per-view channels.[30/] In fact, in one almost unbelievable trial, Comcast and Jerrold have teamed to design a system that would dedicate 25 channels to a single movie, with start times rotating at 5 minute delays.[31/] Indeed the Time-Warner 150-channel cable system in Queens, New York includes 57 channels of pay-per-view.[32/]

21. Fiber is available, cost effective, and is being used in most CATV trunk construction today. It is expanding cable system capacity beyond the number of conventional programming services available to cable systems today. The result is that plans are in the works to use the excess capacity for PCN, pay-per-view, and other subscription services.

Video Compression

22. If fiber optics is a crowbar to pry open previous bottlenecks in CATV systems, then video compression is a sledgehammer to smash the bottleneck to pieces. Fiber optics adds capacity to a cable system. Video compression literally multiplies that capacity by a factor of four or more. Video compression is the future of virtually every video transmission and storage system from CATV to High Definition Television (HDTV). And video compression has already moved from the laboratory to the marketplace.

23. Video compression eliminates redundancy and irrelevancy in video signals, thus reducing the bandwidth required for their transmission. An NTSC television signal requires 6 MHz of bandwidth, but it is possible to fit six

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30/ *See, e.g.*, Brugliera, *supra* note 12, at 18; *Multiple Channels Planned*, TV Digest, September 21, 1991, at 7.

31/ Jesuale, *supra* note 5, at 48.

32/ *Id.* at 48.

compressed NTSC signals in that same 6 MHz bandwidth.[33/] Thus, even a very limited capacity cable system operating at 220 MHz could be upgraded to provide over 100 video channels *without replacing the existing cable plant.*[34/] And 1 GHz systems will be able to provide over 500 channels of television programming. Although decompression converters would need to be provided for every customer, Hal Krisbergh, President of Jerrold, has estimated that these boxes will only cost about 35% more than existing boxes.[35/]

24. Video compression is already being installed in satellite transmission systems for cable programming distribution. National Technological University and Westcott Communications have recently converted to Compression Lab's SpectrumSaver system.[36/] Meanwhile Rogers Cable has been using the General Instruments DigiCipher compression system since July 1992 to provide 4 video signals over a single transponder.[37/] Cablevision Systems and Multivision of Mexico have also selected the DigiCipher system.[38/]

33/ *See, e.g.*, Weinschenk, *DigiCipher Gear Wins High Marks*, Cable World, September 21, 1992, at 46; *Westcott and NTU — Important End Users*, Satellite News, November 2, 1992, at 4; Communications Daily, September 16, 1992, at 5-6.

34/ *See* Tanner, *Digital Compression and Transmission: A Primer for Non-Technical Readers*, Specs, October 1992, at 3.

35/ Weinschenk, *Digital Compression: No Sure Thing*, Cable World, April 27, 1992, at 30.

36/ *Westcott and NTU - Important End Users*, *supra* note 33, at 4.

37/ Weinschenk, *supra* note 33, at 46.

38/ Lambert, *Digital Compression Now Arriving on the Fast Track*, Broadcasting, July 27, 1992, at 40; *Multivision to Use Digicipher*, TV Digest, June 8, 1992, at 7.

25. The migration of compression from the satellite feed to the cable distribution system would appear to be imminent. All of the systems being considered by the Federal Communications Commission for a U.S. standard for terrestrial HDTV use video compression, thus ensuring that integrated circuits will be mass produced as an important component of the next generation of home receivers.

26. Most experts are in agreement that video compression is coming soon to CATV systems and will be cost effective. CableLabs joined with Viacom, Tele-Communications Inc. (TCI), and the Public Broadcasting Systems (PBS) to issue a request for proposals for satellite transponder compression systems in the fall of 1991.[39] The process ultimately led to purchase negotiations between Viacom, TCI, and PBS, and the three compression finalists: AT&T, General Instruments, and Scientific-Atlanta.[40]

27. CableLabs is now focusing on development of headend-to-the-home compression systems.[41] And the experts are predicting that these systems will become available by 1994.[42] John Malone, President of TCI, has opined that compression will have as much impact on the

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[39] Lambert, *supra* note 38, at 40.

[40] *Id.*

[41] *Id.* at 42. CableLabs President Dick Green has said, "In general, I have a lot of faith in the entrepreneurial process that costs are tractable." Weinschenk, *supra* note 35, at 30.

[42] Tony Weselberger, Vice President at Oak Communications, believes compression will hit the market beginning in 1994. Lambert, *supra* note 38, at 44. Mike Harris, Senior Vice President of Century Communications also sees 1994 as a target date for compression in the distribution system. *Building Blocks*, *supra* note 15, at 44. AT&T has also said that their system will be available to cable television operators by 1994. Farhi, *AT&T Announces System to Expand Cable Offerings: Technology Could Allow Up to 500 Channels*, Washington Post, May 5, 1992, at C1.

development of the cable industry as did the availability of communications satellites which made national distribution of programming possible.[43]

Conclusions

28. The history of CATV systems has been a steady expansion of channel capacity. Systems are now in place with 1 GHz of bandwidth and 150 channels of capacity. These systems are pointing the way to the future. Most new systems and upgrades to old systems are providing at least 80 channels of capacity. This expansion is and will continue to be built on the availability of low cost, wide bandwidth fiber optics.

29. Meanwhile, a tremendous explosion in available capacity is at hand with the introduction of video compression technology. This technology has already moved out of the lab and into the marketplace. As systems are upgraded with video compression, their capacity will be multiplied by a factor of four or more. The outlook is for a future where capacity exceeds available programming. Cable industry executives, foreseeing that result, are investigating new services such as PCN to exploit that excess capacity.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 23rd day of November, 1992.

/s/
Notary Public

My Commission Expires February 28, 1994

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[43] *MSO's Prime Compression*, TV Digest, April 22, 1991, at 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Time Warner Entertainment Company, L.P.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2494 (SFW, TPJ, SS)
FCC and United States,	)	
Defendants,	)	
Discovery Communications, Inc., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 92-2558 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants,	)	
National Cable Television Association, Inc.,	)	
Plaintiff,	)	
v.	)	Civ. Action No. 92-2495 (SFW, TPJ, SS)
United States, *et al.*,	)	
Defendants.	)	

AFFIRMATION OF MICHAEL C. RAU

District of Columbia: ss

I, Michael C. Rau, affirm pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Senior Vice President, Science & Technology, of the National Association of Broadcasters. I submit this affidavit in support of the Opposition of Intervenor-Defendant Applicant National Association of Broadcasters to Motions for a Preliminary Injunction Restraining Enforcement of Sections 4 and 6 of the 1992 Cable Act Filed by Plaintiffs TWE, NCTA and Discovery in these cases. This affidavit supplements the information in my earlier affidavit submitted November 22, 1992, in *Turner Broadcasting System* v. *FCC*, Civ. Action No. 92-2247 (SFW, TPJ, SS), and describes recent developments in fiber optics, video compression, and digital video servers for cable television.

2. I am responsible for a broad range of NAB technical affairs and for providing technical advice and guidance to the membership and Board of Directors of the Association. As part of my duties, I review technological developments which may affect the television industry, either through changes in broadcast television systems or changes in other technologies used to distribute television signals, including in particular cable television. Prior to joining NAB in 1981, I was employed by Jules Cohen & Associates, an engineering consulting firm, and by Rau Radio Stations, Inc., a broadcasting company with cable television interests.

3. Plaintiffs have alleged that the must carry requirements of the 1992 Cable Act may cause displacement of certain cable program services because of a lack of capacity in cable systems. However, the channel capacity of cable television systems is being rapidly expanded by cable television companies. The increasing deployment of fiber optics and the use of video compression techniques will

expand significantly the number of channels of capacity available to all cable customers, eliminating any shortage of channel capacity for desirable programming. Perhaps more importantly, however, the development of cost-effective video switching devices to provide video-on-demand completely removes any ceiling or limits on the availability of video programs through cable systems. Video switches shift the program-delivery limitations of cable television systems from the channel-carrying capacity of the systems to the unlimited capacity to store programs in each system's video library. Video switching technology is being deployed not only by cable television systems, but also by telephone companies offering to provide so-called video dial-tone services.

Fiber Optics

4. Recent developments confirm that fiber optics is becoming increasingly prevalent in cable television systems. There are more than 1 million miles of fiber-optic cable in cable systems throughout the U.S. and another 620,000 miles is expected to be installed this year.[1/] In fact, the Myers Reports survey of 834 cable system operators reported that 38% of systems with 12-36 channels, and 40.6% of systems with 37 or more channels, plan to install fiber optic technology.[2/] Overall, 3 out of 4 cable operators are making plans to expand channel capacity.[3/]

5. For example, Time Warner has announced that it plans to upgrade its U.S. cable systems, serving 6.8 million

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[1/] Kathy Berlin, *Fiber Deployment '93: 85 Miles an Hour, Every Day*, Cable World, January 18, 1993, at 32.

[2/] Rich Brown, *Operators Plan Growth Along Fiber Lines*, Broadcasting, February 1, 1993, at 29.

[3/] *Id.*

subscribers, to fiber.[4/] Likewise, Tele-Communications, Inc. (TCI) plans to provide fiber to 90% of its subscribers over the next 4 years.[5/] TCI's Barry Marshall estimates that the use of fiber in multiple system operators' (MSO's) cable trunks will expand from its present percentage of 20% to as much as 40% by the end of 1993.[6/]

6. Technology and cost improvements continue to drive the use of fiber. For example, Jerrold has advertised that its STARFIRE 750 fiber optic laser system can provide 60 analog, or 500 digitally compressed, TV channels on a single fiber. Thus the technology is now in place to expand cable channel capacity to 500 or more channels and cable operators are beginning to implement it.

Video Compression

7. Video compression is the technology that is "launching the era of 500-channel cable systems."[7/] In the past three months, major cable MSOs (Multiple System Operators) have announced plans for systems which will deliver digitally compressed cable television signals into viewers' homes by 1994. This will dramatically multiply the number of signals which can be carried on *existing* cable systems without the need to replace the cable lines.

8. On December 2, 1992, TCI announced that it had agreed to purchase up to 1 million home set-top terminals for

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[4/] Carl Weinschenk, *Time Warner's Billion-Dollar Fiber Plan*, Cable World, December 14, 1992, at 44.

[5/] *TCI Boosts Spending*, TV Digest, January 18, 1993, at 4.

[6/] *Id.*

[7/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 9, 1992, at 1.

receiving compressed digital video signals.[8/] TCI, which operates 443 local cable systems, expects to begin installing the technology in late 1993 or 1994 and expects compression to be available to as many as 95% of its systems by 1995.[9/] It will offer compressed digital video to 1 million of its 9.2 million customers beginning this year.[10/] As a spokesman for Time Warner noted, the TCI venture "absolutely accelerates compression into the here and now."[11/]

9. Initially, TCI plans to convert six or seven analog channels to digital, yielding a total of 60-70 new channels.[12/] Eventually, a 50-channel system will be able to offer 500 channels with this compression technology. TCI expects the near term cost of implementing digital compression to be "de minimis," in part because existing analog set-top converters can be upgraded and reused for roughly $80 each.[13/]

10. On January 26, 1993, Time Warner announced its own digital compression plans.[14/] Time Warner announced that it will use digital compression to provide hundreds of

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[8/] Peter Lambert, *TCI: $200 Million for Channel Explosion*, Broadcasting, December 7, 1992, at 4, 15.

[9/] Geoffrey Foisie, *TCI Sees Compression Paying For Itself*, Broadcasting, December 21, 1992, at 31.

[10/] Kevin Maney, *Technology to Expand Cable TV Services*, USA Today, December 3, 1992, at B1.

[11/] Lambert, *supra* at 4.

[12/] Carl Weinschenk, *Compression Kickstart*, Cable World, December 7, 1992, at 1. *See also* Edmund L. Andrews, *Cable Concern Plans to Offer 500 Channels*, N.Y. Times, December 3, 1992, at A1.

[13/] Foisie, *supra*.

[14/] Geraldine Fabrikant, *Time Warner Plans Cable System of Hundreds of Channels*, N.Y. Times, January 28, 1993, at D15.

channels to its customers as part of its "Full Service Network" serving residential cable subscribers in Orlando, Florida by 1994.[15/] Time Warner emphasized that the Orlando system is not a test and that it is "completely committed to putting this endpoint system" into all its cable clusters.[16/] Other companies have also announced plans to implement digital compression. Viacom, the Public Broadcasting Service, and Request TV have all announced deals to upgrade to digitally compressed video.[17/]

11. Realizing that the 500 channel cable system is imminent, Discovery Communications has developed Your Choice TV, an interactive menu system for accessing hundreds of channels of digital programming.[18/] Viewers will use the menu-driven, remote control system to navigate their way through the hundreds of viewing options which will soon be available to them. First generation equipment is expected by the end of 1993.[19/]

Video Server Technology

12. As digital video compression is being combined with video server and switching technology, cable systems are now entering an era, as described by a Time Warner spokesman,

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[15/] Randy Sukow & Rich Brown, *Time Warner Unveils 'Full Service' TV*, Broadcasting, February 1, 1993, at 6.

[16/] *Time Warner's 'Electronic Superhighway Into The Home'*, TV Digest, February 1, 1993, at 3. *See also* Johnnie L. Roberts & Mary Lu Carnevale, *Time Warner Plans Electronic 'Superhighway'*, Wall St. J., January 27, 1993, at B1.

[17/] Weinschenk, *Compression Kickstart*, *supra*. *See also*, Lambert, *supra*.

[18/] Peggy Ziegler, *500-Channel Future Prompts Menu System from Discovery Comm.*, Cable World, December 14, 1992, at 1.

[19/] *Id.*

of "infinite capacity."[20/] Video server technology is the key to providing true "video on-demand" to cable television viewers.

13. Video server technology fundamentally changes the way in which a cable system delivers video programming to the home. In a conventional cable system, all available programs are simultaneously transmitted through the entire cable system to every television receiver, even though each individual television set can only display one program at a time. Thus, to increase the number of channels available to the viewer, the cable must have the capacity to deliver all of these channels simultaneously to every viewer.

14. Video server technology changes all of this by effectively implementing the channel selector switch upstream in the cable system, toward the cable headend, so that only a single program is transmitted at a time to each receiver, much in the way the telephone system works. This means that the cable to the television receiver no longer needs the capacity to carry dozens of channels simultaneously, but only enough capacity to carry the program to be viewed. Thus, even without the use of fiber optics or video compression, existing cable infrastructure can carry a virtually limitless number of programming choices by use of video server technology.

15. In the Time Warner system being built in Orlando, Florida, homes are to be equipped with high-capacity, random access, digital storage devices capable of holding hundreds or even thousands of video programs.[21/] Digitally compressed video programs will be sent in high speed bursts to the customer's home storage device and accessed "on demand" by the home viewer. High speed digital switching will handle the traffic flow of data bursts to the home storage device and

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[20/] Sukow & Brown, *supra*.

[21/] *Id.*

allow Time Warner to offer telephone and data transmissions over the two-way system.[22/]

16. Video server and switching technology is being aggressively developed and implemented, not only by cable operators, but by the telephone companies to provide "video-on-demand."[23/] It can and will provide virtually infinite capacity, since it eliminates the need to simultaneously transmit all available channels to each TV receiver.

17. Bell Atlantic is using digital compression and video server technology in its video dial tone systems.[24/] Later this year, Bell Atlantic plans to begin offering this video-on-demand service over existing copper wires to 400 subscribers in Fairfax County, Virginia.[25/] The Bell Atlantic system will store digitally compressed video on large, random access storage devices. A viewer will dial up the program of choice which will be routed through a video server, over existing copper wire telephone lines, to the viewer's home. Bell Atlantic will build two-way video server-based networks this summer in Morris County and Dover Township in New

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[22/] *Id.*

[23/] For example, US West recently announced a plan to build a fiber-based broadband network to deliver telephone, interactive video, and video-on-demand services to its 13 million customers in 14 western states. The system will reach its first 100,000 customers by 1994, with half a million new customers a year to be added after that. The US West system initially will be capable of carrying 70-100 video channels, expandable to 500 with compression. *US West Answers Video Dialtone Call*, Broadcasting, February 8, 1992.

[24/] Harry A. Jessell, *Bell Atlantic Takes Early Lead*, Broadcasting, January 4, 1993, at 45. *See also* Carl Weinschenk, *Bell to Cable Industry: We'll See You in Court*, Cable World, December 21, 1992, at 1, 25.

[25/] Jessell, *supra*.

Jersey.[26/] In each case, video server and video switching technology will be used to provide video dial tone service.

Conclusion

18. Recent events have confirmed that channel capacity limitations in cable television systems are vanishing and will shortly be a thing of the past. Cable operators are deploying fiber optics at a rapid pace. Video compression is being aggressively implemented as a cost effective method for literally multiplying the number of channels available. And, with the implementation of video server technology, we are witnessing the initiation of truly "infinite capacity" cable TV systems.

/s/
Michael C. Rau

Subscribed and sworn to before me
this 12th day of February, 1993.

/s/
Notary Public

My Commission Expires February 28, 1994

[26/] *Id. See also*, Rich Brown, *Twain Meet Over Video Dial Tone*, Broadcasting, November 23, 1992, at 4.